May 2006

Update: Michigan Circuit Court Benchbook

CHAPTER 1

General Rules Governing Court Proceedings

1.1 Access to Court Proceedings and Records

F. Limits on Access to Court Records—MCR 8.119(F)

Delete the November 2005 update to page 5. In an order dated March 29, 2006, the Supreme Court reversed the Court of Appeals and remanded the case to that Court for further proceedings. *UAW v Dorsey*, 474 Mich 1097 (2006).

CHAPTER 2

Evidence

Part II—Relevancy (MRE Article IV)

2.14 Similar Acts Evidence

A. Rule

Effective March 24, 2006, 2006 PA 78 enacted a statute authorizing the admission of evidence regarding a defendant's other acts of domestic violence. Insert the following text immediately after the January 2006 update to page 51:

*Applicable to trials and evidentiary hearings started or in progress on or after May 1, 2006.

Evidence that a defendant committed other acts of domestic violence is admissible in a criminal action against a defendant accused of committing an offense involving domestic violence. MCL 768.27b.* If admissible, such evidence may be introduced "for any purpose for which it is relevant, if it is not otherwise excluded under Michigan rule of evidence 403." MCL 768.27b(1). The statutory provisions of MCL 768.27b "do[] not limit or preclude the admission or consideration of evidence under any other statute, rule of evidence, or case law." MCL 768.27b(3).

MCL 768.27b contains a temporal requirement. "Evidence of an act occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that admitting this evidence is in the interest of justice." MCL 768.27b(4).

MCL 768.27b(5) defines the term "domestic violence" for purposes of this statute as "an occurrence of 1 or more of the following acts by a person that is not an act of self-defense:

*"Family or household member" is defined in MCL 768.27b(5)(b).

(*i*) Causing or attempting to cause physical or mental harm to a family or household member.*

(*ii*) Placing a family or household member in fear of physical or mental harm.

(*iii*) Causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.

(*iv*) Engaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested." MCL 768.27b(5)(a).

CHAPTER 2

Evidence

Part II—Relevancy (MRE Article IV)

2.14 Similar Acts Evidence

E. Notice Requirement

Effective March 24, 2006, 2006 PA 78 enacted a statute authorizing the admission of evidence regarding a defendant's other acts of domestic violence. Insert the following text after the January 2006 update to page 54:

MCL 768.27b, which governs the admissibility in criminal cases of evidence of other acts of domestic violence committed by a defendant, contains a notice requirement. MCL 768.27b(2) requires the prosecuting attorney to disclose evidence admissible under this statute, "including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered, to the defendant not less than 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown."

CHAPTER 2

Evidence

Part III—Witnesses, Opinions, and Expert Testimony (MRE Articles VI and VII)

2.35 Medical Malpractice—Expert Testimony

B. Standard of Care

Insert the following two case summaries after the February 2006 update to page 97:

In *Robins v Garg*, ___ Mich App ___ (2006), the Court of Appeals reversed the grant of summary disposition in favor of defendant. The trial court had granted summary disposition based on a finding that plaintiff's standard of care expert was unqualified to testify. In support of his medical malpractice action against a general practitioner, plaintiff had submitted an affidavit of merit by a family practitioner. The Court noted that "[t]he practice of a family practitioner and a general practitioner are alike in that neither practice is limited to a specific branch of medicine." The Court further noted that "[t]he terms family practitioner and general practitioner have become interchangeable." Accordingly, the Court held that "[f]or purposes of satisfying the requirements of MCL 600.2169, . . . a family practitioner and a general practitioner are physicians engaged in the same type of medical practice."

In *Brown v Hayes*, ___ Mich App ___ (2006), the Court of Appeals criticized the Court's prior holding in *McElhaney v Harper-Hutzel Hosp*, 269 Mich App 488, 496 (2006), which found that two people cannot be engaged in the "same health profession" for purposes of MCL 600.2169 unless each has an identical license under the Public Health Code. The plaintiff in *Brown* filed a medical malpractice lawsuit and included with her complaint two affidavits of merit, one signed by a physical therapist and one signed by an occupational therapist. Defendants answered and filed an affidavit of meritorious defense signed by a physical therapist. The trial court granted a default in favor of the plaintiff on the ground that defendants' affidavit of meritorious defense was insufficient because it was not signed by an occupational therapist. The Court of Appeals concluded that registered occupational therapists and licensed physical therapists are engaged in the "same vocation, calling, occupation or employment," and therefore stated that it would conclude that physical therapists and occupational therapists were engaged in the "same health profession" for purposes of MCL 600.2169(1)(b). However, the Court noted that under *McElhaney, supra* two people must have identical licenses under the Public Health Code in order to be engaged in the same health profession for purposes of MCL 600.2169, a holding that the *Brown* Court described as

unreasonable. Accordingly, the Court reluctantly held that for purposes of satisfying MCL 600.2169(1)(b), physical therapists and occupational therapists were not engaged in the "same health profession."

CHAPTER 2

Evidence

Part IV—Hearsay (MRE Article VIII)

2.40 Hearsay Exceptions

K. Statements Narrating, Describing, or Explaining the Infliction or Threat of Physical Injury

Effective March 24, 2006, and applicable to trials and evidentiary hearings started or in progress on or after May 1, 2006, a declarant's statements are admissible under specific circumstances in criminal cases involving domestic violence. 2006 PA 79. At the bottom of page 113, immediately before Section 2.41, add a new subsection as indicated above and insert the following text:

MCL 768.27c establishes a new exception to the hearsay rule for statements purporting to narrate, describe, or explain the infliction or threat of physical injury upon the declarant. This exception applies only to offenses involving domestic violence. A declarant's statement may be admitted under MCL 768.27c if all of the following circumstances exist:

> "(a) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant.
>
> "(b) The action in which the evidence is offered under this section is an offense involving domestic violence.
>
> "(c) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of a statement made more than 5 years before the filing of the current action or proceeding is inadmissible under this section.
>
> "(d) The statement was made under circumstances that would indicate the statement's trustworthiness.
>
> "(e) The statement was made to a law enforcement officer." MCL 768.27c(1).

For purposes of subsection (1)(d) of MCL 768.27c, "circumstances relevant to the issue of trustworthiness include, but are not limited to, all of the following:

> (a) Whether the statement was made in contemplation of pending or anticipated litigation in which the declarant was interested.

> (b) Whether the declarant has a bias or motive for fabricating the statement, and the extent of any bias or motive.
>
> (c) Whether the statement is corroborated by evidence other than statements that are admissible only under this section." MCL 768.27c(2).

For purposes of MCL 768.27c, the phrase "offense involving domestic violence" means "an occurrence of 1 or more of the following acts by a person that is not an act of self-defense:

> (*i*) Causing or attempting to cause physical or mental harm to a family or household member.*
>
> (*ii*) Placing a family or household member in fear of physical or mental harm.
>
> (*iii*) Causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.
>
> (*iv*) Engaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested." MCL 768.27c(5)(b).

*"Family or household member" is defined in MCL 768.27c(5)(c).

MCL 768.27c also contains a notice requirement. MCL 768.27c(3) requires the prosecuting attorney to disclose evidence admissible under the statute, "including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered, to the defendant not less than 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown."

CHAPTER 3

Civil Proceedings

Part V—Trial (MCR Subchapter 2.500)

3.48 Jury Deliberation

A. Materials in Jury Room

By order issued April 7, 2006, the Michigan Supreme Court reversed the Court of Appeals' judgment in *Mays v Schell*, 268 Mich App 432 (2005). *Mays v Schell*, 474 Mich 1109 (2006). Accordingly, delete the November 2005 update to page 231.

CHAPTER 3

Civil Proceedings

Part VII—Rules Governing Particular Types of Actions (Including MCR Subchapters 3.300–3.600)

3.60 Arbitration

D. Judicial Review and Enforcement

Effective May 1, 2006, MCR 3.602(I)–(N) were eliminated. Near the bottom of page 251, delete the last three sentences of the third paragraph in this subsection and delete the last paragraph of page 251 entirely.

CHAPTER 3

Civil Proceedings

Part VII—Rules Governing Particular Types of Actions (Including MCR Subchapters 3.300–3.600)

3.60 Arbitration

E. Timing

Effective May 1, 2006, MCR 3.602(I)–(N) were eliminated. In the middle of page 252, delete the reference to MCR 3.602(I) at the end of the first paragraph and delete the second paragraph in its entirety.

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.25 Search Warrants

C. Affidavit

Insert the following text before the second-to-last paragraph near the bottom of page 358:

A tip received by Crime Stoppers and forwarded to law enforcement must adhere to the standard requirements for search warrants based on information from an unnamed informant. *People v Keller*, ___ Mich App ___, ___ (2006). Where police were unable to establish the anonymous informant's credibility and where information gathered from surveillance and a trash pull did not show that the information from the tipster was reliable, the affidavit was insufficient to establish probable cause and a search warrant should not have been issued. *Keller, supra* at ___.

CHAPTER 4

Criminal Proceedings

Part V—Trials and Post-Trial Proceedings (MCR Subchapter 6.400)

4.48 Jury Instructions

D. Standard of Review

Insert the following text immediately before Section 4.49 on page 435:

Failure to instruct the jury on the defense of accident is not subject to automatic reversal. *People v Hawthorne*, ___ Mich ___, ___ (2006). When a trial judge refuses a defendant's request to deliver an instruction on the defense of accident, a verdict is reversible if the defendant "establishe[s] that the alleged error undermined the reliability of the verdict." *Hawthorne, supra* at ___.

4.49 Jury Deliberation

A. Materials in Jury Room

Delete the November 2005 update to page 435. In an order dated April 7, 2006, the Supreme Court reversed the Court of Appeals' judgment and reinstated the trial court's order granting a new trial. *Mays v Schell*, 474 Mich 1109 (2006).

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.59 Sentencing—Jail Credit

C. Arrested Parolees

Insert the following text after the partial paragraph at the top of page 466:

See also *People v Stead*, ___ Mich App ___, ___ (2006). A defendant who spends time in jail for an offense committed while the defendant was on parole is a parole detainee for whom bond is not considered. A parole detainee is entitled to credit against the sentence from which he or she was paroled for any time spent in jail awaiting disposition of the new offense.

E. Consecutive Sentences

Insert the following text after the existing paragraph on page 466:

A term of imprisonment for conviction of an offense committed by a defendant while on parole begins after expiration of the original sentence. *People v Stead*, ___ Mich App ___, ___ (2006). Any time the defendant spent in jail awaiting disposition of the later offense is creditable only toward the sentence from which he or she was paroled. *Stead, supra* at ___.

April 2006

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CHAPTER 2

Evidence

Part IV—Hearsay (MRE Article VIII)

2.40 Hearsay Exceptions

I. Declarant Unavailable—MRE 804, MCL 768.26

Insert the following text after the January 2006 update to page 112:

In *People v Jones*, ___ Mich App ___, ___ (2006), the Court first affirmed that the admission of an unavailable witness's testimonial statement does not violate the Confrontation Clause if the defendant caused the witness to be unavailable. Concurring with *United States v Cromer*, 389 F3d 662 (CA 6, 2004), the *Jones* Court determined that because the witness's unavailability was procured by the defendant's wrongdoing, the defendant forfeited his constitutional right to confront that witness. In *Jones*, the only eyewitness to a shooting identified the defendant as the shooter in a statement to police. However, the witness refused to testify at trial regarding defendant's involvement in the shooting. At a separate hearing regarding his refusal to testify, the witness stated "that he feared retribution if he testified, particularly because certain individuals were present in the courtroom." *Jones, supra* at ___. The trial court admitted the witness's statement to police into evidence under MRE 804(b)(6). The Court of Appeals rejected defendant's assertion that the prosecutor failed to establish that defendant "engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness," as required by MRE 804(b)(6). The Court of Appeals concluded that evidence that members of a gang to which defendant belonged threatened the witness satisfied the rule's requirements.

CHAPTER 3

Civil Proceedings

Part III—Discovery (MCR Subchapter 2.300)

3.29 Independent Medical Examinations

B. Report of Physician, Physician's Assistant, or Certified Nurse Practitioner

Effective March 9, 2006, 2006 PA 49 amended the statute governing independent medical examinations to provide that reports from a physician's assistant or certified nurse practitioner must also be delivered to the person examined. Change the title of subsection (B) as indicated above and replace the first sentence at the top of page 192 with the following text:

A copy of the report and findings by the examining licensed physician, licensed physician's assistant or certified nurse practitioner shall be provided to the person examined or his or her attorney, MCL 600.1445(3), and also to the party causing the examination, MCR 2.311(B).

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.14 Double Jeopardy

C. Multiple Punishments for the Same Offense

Insert the following text after the May 2005 update to page 317:

Where the statutory language expressly states that a penalty imposed under the home invasion statute does not preclude the imposition of a penalty under other applicable law, the Legislature clearly intended to allow multiple punishments for criminal conduct occurring during the same incident from which a defendant's home invasion conviction arose. *People v Conley*, ___ Mich App ___, ___ (2006). Therefore, in *Conley*, the defendant's convictions of first-degree home invasion and felonious assault did not violate the defendant's constitutional protection against double jeopardy. *Id*.

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.21 Search and Seizure Issues

E. Was a Warrant Required?

5. Consent

Consent by third person:

Insert the following text at the bottom of page 342:

A warrantless search of a shared dwelling conducted pursuant to the consent of one co-occupant when a second co-occupant is present and expressly refuses to consent to the search is unreasonable and invalid as to the co-occupant who refused consent. *Georgia v Randolph*, 547 US ___, ___ (2006).

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.21 Search and Seizure Issues

G. Is Exclusion the Remedy if a Violation Is Found?

2. Inevitable Discovery Exception

Insert the following text before the last paragraph in this sub-subsection on page 348:

When a witness's identity is obtained through a violation of the defendant's Sixth Amendment right to counsel, the witness's testimony is inadmissible under the exclusionary rule unless the prosecution establishes an exception to the rule, e.g., that the evidence would have been inevitably discovered by means independent of the constitutional violation. *People v Frazier*, ___ Mich App ___, ___ (2006).

3. Independent Source Exception

Insert the following text after the paragraph in this sub-subsection on page 348:

See also *People v Frazier*, ___ Mich App ___, ___ (2006) (the testimony of witnesses identified during the unconstitutional interrogation of the defendant need not be excluded if the prosecution can establish that the identity of the witnesses would have been discovered by means independent of the constitutional violation).

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.25 Search Warrants

F. Anticipatory Search Warrants

Insert the following text after the existing paragraph near the top of page 360:

Anticipatory search warrants do not violate the Fourth Amendment's warrant clause. *United States v Grubbs*, 547 US ___, ___ (2006). In *Grubbs*, the United States Supreme Court also held that the condition triggering execution of the warrant need not be stated in the warrant; the Fourth Amendment's "particularity requirement" demands only "the place to be searched" and "the persons or things to be seized" be set forth in a warrant.

CHAPTER 4
Criminal Proceedings

Part V—Trials (MCR Subchapter 6.400)

4.38 Jury Trial

C. Voir Dire

2. Peremptory Challenges

Insert the following text after the partial paragraph at the top of page 407:

By peremptory order dated March 8, 2006, the Michigan Supreme Court vacated *People v Barron (Barron I)*, unpublished opinion per curiam of the Court of Appeals, decided March 22, 2005 (Docket No. 251402), and remanded the case to the Court of Appeals for reconsideration in light of the Supreme Court's decision in *People v Bell*, 473 Mich 275 (2005). *People v Barron (Barron II)*, ___ Mich ___ (2006).

In *Barron I*, the Court of Appeals concluded that error requiring reversal occurred when the trial court wrongly refused to allow the defendant to exercise his final peremptory challenge during jury selection. However, in dicta in *Bell*, the Michigan Supreme Court indicated that a trial court's improper denial of a party's exercise of its peremptory challenges is subject to a harmless error standard of review. *Bell, supra* at 293. According to the Michigan Supreme Court, "to the extent that [it] hold[s] that a violation of the right to a peremptory challenge requires automatic reversal," *People v Schmitz*,* a decision on which the Court of Appeals relied in deciding *Barron I*, is no longer binding precedent. *Bell, supra* at 293.

*231 Mich App 521 (1998). Also cited in the third line of the partial paragraph at the top of page 407.

CHAPTER 4

Criminal Proceedings

Part V—Trials (MCR Subchapter 6.400)

4.41 Confrontation

A. Defendant's Right of Confrontation

4. Unavailable Witness

Insert the following text after the January 2006 update to page 415:

The inadmissibility of testimonial evidence as explained in the United States Supreme Court's decision in *Crawford v Washington*, 541 US 36 (2004), does not preclude admission of prior testimony given by a witness made unavailable at trial by the defendant's own conduct. *People v Jones*, ___ Mich App ___, ___ (2006). According to the *Jones* Court:

> "[T]he United States Supreme Court did not intend to deem testimonial hearsay evidence, as in the present case, inadmissible based on a witness's unavailability and the lack of a prior opportunity for cross-examination if the defendant is responsible for procuring the witness's unavailability.
>
> * * *
>
> "Defendant's constitutional right to confrontation is waived under the forfeiture by wrongdoing doctrine if hearsay testimony is properly admitted because the declarant's unavailability was procured by defendant's wrongdoing." *Jones, supra* at ___.

CHAPTER 4
Criminal Proceedings

Part V—Trials (MCR Subchapter 6.400)

4.43 Defendant's Conduct and Appearance at Trial

A. Presumption of Innocence

3. Gagging

Insert the following text before subsection (B) on page 418:

A defendant is not denied his right to a fair trial when, after the defendant has interrupted the court proceedings on several occasions, the trial judge threatens to tape the defendant's mouth shut if the defendant continues his disruptive verbal outbursts. *People v Conley*, ___ Mich App ___, ___ (2006).

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.54 Sentencing—Felony

B. Sentencing Guidelines

Insert the following text after the first full paragraph on page 449:

The requirement that a trial court articulate the reasons for imposing a sentence may be satisfied by the court's explicit or implicit indication that it relied on the sentencing guidelines in fashioning the sentence imposed. *People v Conley*, ___ Mich App ___, ___ (2006).

Insert the following text after the first sentence in the last full paragraph on page 449:

A defendant must be resentenced when he or she is sentenced pursuant to a cell range based on inaccurate guidelines scoring or calculation, even if the sentence imposed under the erroneous cell range is within the cell range indicated after any errors are corrected. *People v Francisco*, ___ Mich ___, ___ (2006).

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.58 Sentencing—Sexually Delinquent Person

C. Application

Delete the content of the November 2005 update to page 463 and insert the following:

By peremptory order dated March 10, 2006, the Michigan Supreme Court vacated the Court of Appeals opinion in *People v Buehler (On Remand)*, 268 Mich App 475 (2005), and remanded the case to that Court to consider "whether any term of imprisonment that may be imposed by the circuit court is controlled by the legislative sentencing guidelines or by the indeterminate sentence prescribed by MCL 750.335a."* *People v Buehler*, ___ Mich ___ (2006).

*The Court of Appeals was also ordered to consider whether the trial court gave substantial and compelling reasons for its acknowledged departure from the guidelines.

February 2006

Update: Michigan Circuit Court Benchbook

CHAPTER 2

Evidence

Part III—Witnesses, Opinions, and Expert Testimony (MRE Articles VI and VII)

2.35 Medical Malpractice—Expert Testimony

B. Standard of Care

Immediately before subsection (C) on page 97, insert the following case summary:

In *McElhaney v Harper-Hutzel Hosp,* ___ Mich App ___ (2006), the Court of Appeals affirmed the grant of summary disposition in favor of defendant based on plaintiff's failure to establish a genuine issue of material fact regarding the standard of care applicable to a nurse midwife. In support of this medical malpractice action, plaintiff submitted an affidavit of merit by two obstetricians/gynecologists. The Court noted that "[f]or an expert to be qualified to testify regarding the standard of care, the expert must be qualified under MCL 600.2169(1). In this instance, plaintiff's experts, as obstetricians/gynecologists, did not qualify to testify regarding the standard of care applicable to defendant's nurse midwife because they did not practice in "the same health profession" as the nurse midwife. The Court ruled that "because nurse midwives are separately licensed professionals who practice nursing with specialty certification in the practice of nurse midwifery, obstetricians/gynecologists may not testify about their standard of practice or care."

CHAPTER 3

Civil Proceedings

Part II—Pretrial Motions (MCR Subchapters 2.100 and 2.200)

3.24 Summary Disposition

B. Timing

On December 29, 2005, the Court of Appeals approved *Kemerko Clawson LLC v RXIV Inc* for publication. In the November 2005 update to page 175, replace the citation after the first sentence with the following citation:

Kemerko Clawson LLC v RXIV Inc, ___ Mich App ___, ___ (2005).

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.21 Search and Seizure Issues

G. Is Exclusion the Remedy if a Violation Is Found?

1. Good-Faith Exception

Insert the following text after the December 2005 update to page 348:

Even where a search warrant is based in part on tainted evidence obtained as a result of an officer's Fourth Amendment violation—"fruit of the poisonous tree"—the good-faith exception to the exclusionary rule may apply to evidence seized pursuant to the warrant if "'an objectively reasonable officer could have believed the seizure valid.'" *United States v McClain*, 430 F3d 299, 308 (CA 6, 2005), quoting *United States v White*, 890 F2d 1413, 1419 (CA 8, 1989).

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.22 Automobile Searches

D. Searching a Container Located in an Automobile

Insert the following text on page 351 immediately before subsection (E):

In the context of automobile searches, a computer may be considered a container of the data stored in the computer's memory. *People v Dagwan*, ___ Mich App ___, ___ (2005).

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.54 Sentencing—Felony

D. Imposition of Sentence

8. Fines and Costs

Effective January 1, 2006, 2005 PA 316 amended the Code of Criminal Procedure to add MCL 769.1k. Insert the following text on page 453 after the existing paragraph:

MCL 769.1k provides a general statutory basis for a court's authority to impose specified monetary penalties when sentencing a defendant and to collect the amounts owed at any time. MCL 769.1k states:

> "(1) If a defendant enters a plea of guilty or nolo contendere or if the court determines after a hearing or trial that the defendant is guilty, both of the following apply at the time of the sentencing or at the time entry of judgment of guilt is deferred pursuant to statute or sentencing is delayed pursuant to statute:
>
> > "(a) The court shall impose the minimum state costs as set forth in [MCL 769.1j].
> >
> > "(b) The court may impose any or all of the following:
> >
> > > "(*i*) Any fine.
> > >
> > > "(*ii*) Any cost in addition to the minimum state cost set forth in subdivision (a).
> > >
> > > "(*iii*) The expenses of providing legal assistance to the defendant.
> > >
> > > "(*iv*) Any assessment authorized by law.
> > >
> > > "(*v*) Reimbursement under [MCL 769.1f].
>
> "(2) Subsection (1) applies regardless of whether the defendant is placed on probation, probation is revoked, or the defendant is discharged from probation.

"(3) The court may require the defendant to pay any fine, cost, or assessment ordered to be paid under this section by wage assignment.

"(4) The court may provide for the amounts imposed under this section to be collected at any time."

January 2006

Update: Michigan Circuit Court Benchbook

CHAPTER 2

Evidence

Part I—General Matters (MRE Articles I, II, III, V, and XI)

2.9 Limits on Evidence and Testimony

B. Limiting the Length of Questioning

Effective January 1, 2006, MCR 6.414 was amended. On page 35, replace the second sentence with the following text:

Trial courts have the discretion to limit voir dire, MCR 2.511(C) and MCR 6.412(C); MCR 2.507(F) and MCR 6.414(C) and (G) permit a trial court to impose reasonable time limits on opening statements and closing arguments; and trial courts apparently may exercise reasonable discretion over the length of witness interrogation.

CHAPTER 2

Evidence

Part II—Relevancy (MRE Article IV)

2.14 Similar Acts Evidence

A. Rule

Effective January 1, 2006, 2005 PA 135 enacted MCL 768.27a. Insert the following text immediately before subsection (B) on page 51:

MCL 768.27a governs the admissibility of evidence of sexual offenses against minors. It applies only to criminal cases. MCL 768.27a(1) states in part:

> "Notwithstanding [MCL 768.27], in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant."

"Listed offenses" are contained in MCL 28.722. MCL 768.27a(2)(a).

CHAPTER 2
Evidence

Part II—Relevancy (MRE Article IV)

2.14 Similar Acts Evidence

E. Notice Requirement

Effective January 1, 2006, 2005 PA 135 enacted MCL 768.27a. Insert the following text immediately before subsection (F) on page 54:

MCL 768.27a, which governs the admissibility of evidence of sexual offenses against minors in criminal cases, also contains a notice requirement. MCL 768.27a(1) requires the prosecuting attorney to disclose evidence admissible under that statute to the defendant "at least 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered."

CHAPTER 2

Evidence

Part III—Witnesses, Opinions, and Expert Testimony (MRE Articles VI and VII)

2.31 Self-Incrimination

B. Assertion of Privilege

On page 83, eliminate the October 2005 update to Section 2.31(B). On December 1, 2005, the ruling in *Davis v Straub,* 421 F3d 365 (CA 6, 2005) was vacated. *Davis v Straub,* ___ F3d ___, ___ (CA 6, 2005).

CHAPTER 2
Evidence

Part IV—Hearsay (MRE Article VIII)

2.40 Hearsay Exceptions

I. Declarant Unavailable—MRE 804, MCL 768.26

Insert the following text after the May 2005 update to page 112:

See also *People v Bauder,* ___ Mich App ___, ___ (2005), affirming that the use of a murder victim's non-testimonial statements did not violate defendant's Confrontation Clause rights. Concurring with *United States v Garcia-Meza,* 403 F3d 364 (CA 6, 2005), the *Bauder* Court determined that defendant's admission that he killed the victim resulted in the forfeiture of his constitutional right to confront the victim.

CHAPTER 3

Civil Proceedings

Part II—Pretrial Motions (MCR Subchapters 2.100 and 2.200)

3.15 Motions

F. Decision

Effective January 1, 2006, MCR 8.107 was amended. On page 156, replace the final paragraph with the following text:

A decision should be rendered no later than 35 days after submission. MCR 8.107(A). Matters not decided within 56 days of submission must be identified on the quarterly "Report as to Matters Undecided." MCR 8.107(B).

CHAPTER 3

Civil Proceedings

Part IV—Resolution Without Trial (MCR Subchapter 2.400)

3.32 Offer of Judgment

C. Amount

On the top of page 198, after the first sentence, insert the following text:

While the value of property may be variable, MCR 2.405(A)(1) is applicable to issues involving property if the offer is for a "sum certain." *Knue v Smith,* ___ Mich App ___, ___ (2005).

D. Timing

On page 198, replace the first sentence of the paragraph with:

An offer of judgment can be made no less than 28 days before trial. MCR 2.405(B). *Knue v Smith*, ___ Mich App ___, ___ (2005).

CHAPTER 3

Civil Proceedings

Part V—Trial (MCR Subchapter 2.500)

3.38 Jury Selection

E. Voir Dire

Effective January 1, 2006, MCR 2.511 was amended. On page 213, replace the second paragraph with the following text:

MCR 2.511(G) provides:

> "Replacement of Challenged Jurors. After the jurors have been seated in the jurors' box and a challenge for cause is sustained or a peremptory challenge or challenges exercised, another juror or other jurors must be selected and examined. Such jurors are subject to challenge as are previously seated jurors."

MCR 2.511(F) prohibits discrimination in the jury selection process. That rule states:

> "(1) No person shall be subjected to discrimination during voir dire on the basis of race, color, religion, national origin, or sex.
>
> "(2) Discrimination during voir dire on the basis of race, color, religion, national origin, or sex for the purpose of achieving what the court believes to be a balanced, proportionate, or representative jury in terms of these characteristics shall not constitute an excuse or justification for a violation of this subsection."

CHAPTER 3
Civil Proceedings

Part V—Trial (MCR Subchapter 2.500)

3.38 Jury Selection

F. Challenge for Cause

On page 214, before the first full paragraph, insert the following text:

> **Note:** Subsequent to the ruling in *Froede v Holland Ladder Co,* 207 Mich App 127 (1994), 2002 PA 739 amended MCL 600.1307a to require that a person "[n]ot have been convicted of a felony" to qualify as a juror. Effective January 1, 2006, MCR 2.511(D) was amended to eliminate having been convicted of a felony as a basis to challenge for cause the seating of a prospective juror.

CHAPTER 3
Civil Proceedings

Part V—Trial (MCR Subchapter 2.500)

3.39 Voir Dire

A. Generally

Effective January 1, 2006, MCR 2.511 was amended. On page 217, replace the fourth paragraph with the following text:

MCR 2.511(G) provides:

> "Replacement of Challenged Jurors. After the jurors have been seated in the jurors' box and a challenge for cause is sustained or a peremptory challenge or challenges exercised, another juror or other jurors must be selected and examined. Such jurors are subject to challenge as are previously seated jurors."

MCR 2.511(F) prohibits discrimination in the jury selection process. That rule states:

> "(1) No person shall be subjected to discrimination during voir dire on the basis of race, color, religion, national origin, or sex.
>
> "(2) Discrimination during voir dire on the basis of race, color, religion, national origin, or sex for the purpose of achieving what the court believes to be a balanced, proportionate, or representative jury in terms of these characteristics shall not constitute an excuse or justification for a violation of this subsection."

CHAPTER 4

Criminal Proceedings

Part I—Preliminary Proceedings (MCR Subchapters 6.000 and 6.100)

4.3 Pretrial Release

D. Conditional Release

MCR 6.106(D)(2) was amended, effective January 1, 2006. Add the following new sub-subsection (m) to the quoted rule at the top of page 274 and reletter the remaining paragraphs accordingly:

> "(m) comply with any condition limiting or prohibiting contact with any other named person or persons. If an order under this paragraph limiting or prohibiting contact with any other named person or persons is in conflict with another court order, the most restrictive provision of each order shall take precedence over the other court order until the conflict is resolved." MCR 6.106(D)(2)(m).

E. Money Bail

The money bail and bond requirements in MCR 6.106(E) were amended, effective January 1, 2006. On page 274, replace the second sentence in the first paragraph with the following text:

MCR 6.106(E)(1)(a) states:

"(1) The court may require the defendant to

"(a) post, at the defendant's option,

"(i) a surety bond that is executed by a surety approved by the court in an amount equal to 1/4 of the full bail amount, or

"(ii) bail that is executed by the defendant, or by another who is not a surety approved by the court, and secured by

"[A] a cash deposit, or its equivalent, for the full bail amount, or

> "[B] a cash deposit of 10 percent of the full bail amount, or, with the court's consent,
>
> "[C] designated real property[.]"

Replace the second sentence in the second paragraph on page 274 with the following text:

Under this subrule, the defendant cannot post a surety bond in an amount equal to 1/4 of the full bail amount (must be equal to the full bail amount), nor can the defendant post a cash deposit of 10% of the bond amount (must be a cash deposit, or its equivalent, equal to the full bail amount).*

*MCR 6.106(E)(1)(b), as amended, effective January 1, 2006.

CHAPTER 4

Criminal Proceedings

Part I—Preliminary Proceedings (MCR Subchapters 6.000 and 6.100)

4.3 Pretrial Release

H. Custody Hearing

MCR 6.106(G)(1) was amended, effective January 1, 2006, to permit the prosecutor to request a custody hearing. On page 276, replace the third sentence in the paragraph with the following language:

The court may conduct a custody hearing if the defendant is being held in custody pursuant to MCR 6.106(B) and either the defendant or the prosecutor requests a custody hearing.

CHAPTER 4

Criminal Proceedings

Part I—Preliminary Proceedings (MCR Subchapters 6.000 and 6.100)

4.5 Attorneys—Waiver of Counsel

C. Advice at Subsequent Proceedings

MCR 6.005 was amended, effective January 1, 2006. Add the following language to the last paragraph on page 284:

If the prosecution would be significantly prejudiced by an adjournment and a defendant has not been reasonably diligent in seeking counsel, the court may refuse to grant an adjournment to appoint counsel or to permit the defendant to retain counsel. MCR 6.005(E).

CHAPTER 4

Criminal Proceedings

Part I—Preliminary Proceedings (MCR Subchapters 6.000 and 6.100)

4.7 Preliminary Examination—Motion to Quash

B. Initial Bind Over by District Court

At the top of page 289, replace the first sentence in the first paragraph with the following language:

Where the law permits a preliminary examination, it must be held within 14 days of arraignment unless adjourned for good cause. MCL 766.4; MCL 766.7; MCR 6.104(E)(4); MCR 6.110(A), (B).* If the parties consent to the adjournment, the court may adjourn the preliminary examination for a reasonable time, for good cause shown. MCR 6.110(B), as amended. If a party objects to an adjournment, the court must make a finding on the record of good cause shown before the court may adjourn the preliminary examination. MCR 6.110(B), as amended. Any violation of the requirements in subrule (B) is harmless error unless the defendant shows actual prejudice as a result of the violation. MCR 6.110(B), as amended.

*MCR 6.110(A), as amended, effective January 1, 2006.

In the third paragraph on page 289, eliminate the asterisk after the first sentence and its corresponding side note.

CHAPTER 4

Criminal Proceedings

Part I—Preliminary Proceedings (MCR Subchapters 6.000 and 6.100)

4.8 Information

C. Joinder of Counts

1. Single Defendant

Effective January 1, 2006, MCR 6.120 was amended and significantly reorganized. On page 292, beginning with the second paragraph, replace the text in this sub-subsection with the following text:

Except where a defendant is entitled to the severance of unrelated charges, the court—on its own initiative, a party's motion, or the stipulation of all parties—may join against a single defendant offenses charged in more than one information or indictment. MCR 6.120(B).

Similarly, except where a defendant is entitled to severance, the court—on its own initiative, a party's motion, or the stipulation of all parties—may sever offenses charged in a single information or indictment against a single defendant. MCR 6.120(B).

A court may join or sever charges under MCR 6.120(B) "when appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense." MCR 6.120(B). MCR 6.120(B) further states:

> "(1) Joinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on
>
> > "(a) the same conduct or transaction, or
> >
> > "(b) a series of connected acts, or
> >
> > "(c) a series of acts constituting parts of a single scheme or plan.
>
> "(2) Other relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties' readiness for trial.

> "(3) If the court acts on its own initiative, it must provide the parties an opportunity to be heard.

On a defendant's motion, unrelated charges against that defendant must be severed for separate trials. MCR 6.120(C).

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.9 Motions

F. Disposition

Effective January 1, 2006, MCR 8.107 was amended. On page 295, replace the third paragraph with the following text:

Judges and judicial officers should promptly determine matters submitted to them. Specifically, MCR 8.107(A) states:

> "Matters under submission to a judge or judicial officer should be promptly determined. Short deadlines should be set for presentation of briefs and affidavits and for production of transcripts. Decisions, when possible, should be made from the bench or within a few days of submission; otherwise a decision should be rendered no later than 35 days after submission. For the purpose of this rule, the time of submission is the time the last argument or presentation in the matter was made, or the expiration of the time allowed for filing the last brief or production of transcripts, as the case may be." MCR 8.107(A).

Matters not decided within 56 days of submission must be identified on the quarterly "Report as to Matters Undecided." MCR 8.107(B).

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.18 Separate or Joint Trial

A. One Defendant—Multiple Charges

Effective January 1, 2006, MCR 6.120 was amended and significantly reorganized. Beginning near the bottom of page 323 and continuing to page 324, replace the entire text in this subsection with the following text:

A defendant may be charged with two or more offenses in a single information or indictment filed by the prosecuting attorney. MCR 6.120(A). However, each offense with which a defendant is charged must be stated in a separate count. *Id*. When two or more informations or indictments are filed against a single defendant, they may be consolidated for a single trial. *Id*.

Except where a defendant is entitled to the severance of unrelated charges, the court—on its own initiative, a party's motion, or the stipulation of all parties—may join against a single defendant offenses charged in more than one information or indictment. MCR 6.120(B).

Similarly, except where a defendant is entitled to severance, the court—on its own initiative, a party's motion, or the stipulation of all parties—may sever offenses charged in a single information or indictment against a single defendant. MCR 6.120(B).

A court may join or sever charges under MCR 6.120(B) "when appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense." MCR 6.120(B). MCR 6.120(B) further states:

> "(1) Joinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on
>
> > "(a) the same conduct or transaction, or
> >
> > "(b) a series of connected acts, or
> >
> > "(c) a series of acts constituting parts of a single scheme or plan.

> "(2) Other relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties' readiness for trial.
>
> "(3) If the court acts on its own initiative, it must provide the parties an opportunity to be heard.

On a defendant's motion, unrelated charges against that defendant must be severed for separate trials. MCR 6.120(C).

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.19 Speedy Trial

A. Right to a Speedy Trial

After the second sentence in the first paragraph on page 326, insert the following text:

"Whenever the defendant's constitutional right to a speedy trial is violated, the defendant is entitled to dismissal of the charge with prejudice." MCR 6.004(A).*

*As amended, effective January 1, 2006.

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.19 Speedy Trial

B. Recognizance Release

Replace the quoted text following the first paragraph on page 328 with the following:

*As amended, effective January 1, 2006.

> "In a felony case in which the defendant has been incarcerated for a period of 180 days or more to answer for the same crime or a crime based on the same conduct or arising from the same criminal episode, or in a misdemeanor case in which the defendant has been incarcerated for a period of 28 days or more to answer for the same crime or a crime based on the same conduct or arising from the same criminal episode, the defendant must be released on personal recognizance, unless the court finds by clear and convincing evidence that the defendant is likely either to fail to appear for future proceedings or to present a danger to any other person or the community." MCR 6.004(C).*

In the introductory sentence after the above paragraph and before the remaining text on page 328, replace "6-month period" with "180-day period."

C. Untried Charges Against State Prisoners—180-Day Rule

MCR 6.004(D) was amended, effective January 1, 2006. Replace the quoted statutory text of MCR 6.004(D)(1)(a)–(b) on page 329 with the following text:

> "the inmate shall be brought to trial within 180 days after the department of corrections causes to be delivered to the prosecuting attorney of the county in which the warrant, indictment, information, or complaint is pending written notice of the place of imprisonment of the inmate and a request for final disposition of the warrant, indictment, information, or complaint. The request shall be accompanied by a statement setting forth the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time or disciplinary credits earned, the time of

> parole eligibility of the prisoner, and any decisions of the parole board relating to the prisoner. The written notice and statement shall be delivered by certified mail." MCR 6.004(D)(1).

Replace the quoted text of MCR 6.004(D)(2), which begins just below the middle of page 329, with the following text:

> "(2) Remedy. In the event that action is not commenced on the matter for which request for disposition was made as required in subsection (1), no court of this state shall any longer have jurisdiction thereof, nor shall the untried warrant, indictment, information, or complaint be of any further force or effect, and the court shall enter an order dismissing the same with prejudice." MCR 6.004(D)(2).

Add the following **Note** before the last paragraph at the bottom of page 329:

> **Note:** The following cases were decided prior to the January 1, 2006, amendment of MCR 6.004(D). Thus, their continued viability must be evaluated in light of the 2006 amendment. In particular, trial courts should evaluate the continued viability of *People v Roscoe*, 162 Mich App 710 (1986), *People v Hill*, 402 Mich 272 (1978), and *People v Hendershot*, 357 Mich 300 (1959), and its progeny.

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.19 Speedy Trial

D. Detainers

Insert the following text after the second paragraph on page 331:

However, the 120-day time limit may be tolled when the delay was caused by defense counsel's motion to withdraw from representing a defendant due to a conflict of interest. *People v Stone*, ___ Mich App ___, ___ (2005). In *Stone*, the trial court properly excluded the 13-day period from the IAD's time limit calculations because defense counsel's withdrawal on the basis of a conflict of interest is an act "typically [done] for the benefit of the defendant." *Stone, supra* at ___. Where a delay results from action taken to accommodate the defendant's interests, the period of delay is properly excluded from the IAD's 120-day limit. *Stone, supra* at ___.

CHAPTER 4

Criminal Proceedings

Part III—Discovery and Required Notices (MCR Subchapter 6.200)

4.26 Discovery

A. Generally

Effective January 1, 2006, MCR 6.201 was amended. In the fourth paragraph on page 361, delete the asterisk and its corresponding side note.

The Michigan Supreme Court did not adopt the proposed amendments to MCR 6.610 concerning discovery in criminal matters over which the district court has jurisdiction. On page 362, delete the last sentence in the paragraph before subsection (B), the asterisk, and its corresponding side note.

CHAPTER 4

Criminal Proceedings

Part III—Discovery and Required Notices (MCR Subchapter 6.200)

4.26 Discovery

D. Violation of Discovery Order

Before the first paragraph at the top of page 365, insert the following text:

MCR 6.201(B)(1)–(5) requires the prosecutor, at the defendant's request, to provide the defendant with specific information possessed by the prosecution. The subrule applicable to discovery violations provides:

> "(J) Violation. If a party fails to comply with this rule, the court, in its discretion, may order the party to provide the discovery or permit the inspection of materials not previously disclosed, grant a continuance, prohibit the party from introducing in evidence the material not disclosed, or enter such other order as it deems just under the circumstances. Parties are encouraged to bring questions of noncompliance before the court at the earliest opportunity. Wilful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court. An order of the court under this section is reviewable only for abuse of discretion." MCR 6.201(J).*

*As amended, effective January 1, 2006.

CHAPTER 4

Criminal Proceedings

Part III—Discovery and Required Notices (MCR Subchapter 6.200)

4.30 Witnesses—Disclosure and Production

B. Witness List

Insert the following language after the second sentence in the paragraph on page 381:

The applicable court rule permits a party to amend its witness list without leave of the court up to 28 days before trial. MCR 6.201(A)(1).*

*As amended, effective January 1, 2006.

Insert the following text after the paragraph on page 381:

MCR 6.201(A)(1) requires a party to provide all other parties with the names and addresses of all witnesses the party may call at trial. "[I]n the alternative, a party may provide the name of the witness and make the witness available to the other party for interview[.]" *Id*.*

*As amended, effective January 1, 2006.

CHAPTER 4

Criminal Proceedings

Part III—Discovery and Required Notices (MCR Subchapter 6.200)

4.30 Witnesses—Disclosure and Production

F. Unavailable Witnesses

Insert the following text after the first paragraph on page 383:

Under the equitable doctrine of forfeiture, a defendant forfeits his or her constitutional claims regarding the admissibility of statements made by an unavailable witness when the witness' unavailability resulted from the defendant's wrongdoing. *People v Bauder*, ___ Mich App ___, ___ (2005).

> **Note:** For detailed information on testimonial evidence, a defendant's right to confrontation, and hearsay exceptions applicable to unavailable witnesses, see Section 2.40(I) on page 112 and the corresponding updates to page 112.

CHAPTER 4
Criminal Proceedings

Part IV—Pleas (MCR Subchapter 6.300)

4.31 Felony Plea Proceedings

B. Plea Requirements

1. An Understanding Plea

Effective January 1, 2006, MCR 6.302 was further amended, and the provisions in MCR 6.302(B) were reorganized. Replace the August 2005 update to page 385 with the following:

The court may, orally or in writing, advise one or more defendants at the same time of the guilty plea rights in MCR 6.302(B)(3) and (B)(5). MCR 6.302(B). The court may not use a writing to advise a defendant of the guilty plea rights found in MCR 6.302(B)(1), (B)(2), or (B)(4). MCR 6.302(B). If a writing is used to advise a defendant of the rights listed in MCR 6.302(B)(3) and (B)(5), the information must appear on a form approved by the State Court Administrative Office. MCR 6.302(B). If a writing is used to advise the defendant of the rights listed in MCR 6.302(B)(3) and (B)(5), "the court shall address the defendant and obtain from the defendant orally on the record a statement that the rights were read and understood and a waiver of those rights. The waiver may be obtained without repeating the individual rights." MCR 6.302(B).

CHAPTER 4

Criminal Proceedings

Part IV—Pleas (MCR Subchapter 6.300)

4.31 Felony Plea Proceedings

D. Remedy for a Defective Plea

Effective January 1, 2006, MCR 6.311 was deleted and its provisions were incorporated into MCR 6.310. In the second sentence of the first paragraph on page 386, delete the citation to MCR 6.311.

CHAPTER 4
Criminal Proceedings

Part IV—Pleas (MCR Subchapter 6.300)

4.33 Plea of Not Guilty by Reason of Insanity—MCR 6.304

Effective January 1, 2006, MCR 6.304(C)(2) was amended. Near the top of page 390, replace the text in (2) with the following language:

> (2) that, by a preponderance of the evidence, the defendant was legally insane at the time of the offense.

4.34 Plea of Guilty but Mentally Ill—MCR 6.303

Replace the second sentence in the first paragraph on page 390 with the following text:

"In addition to establishing a factual basis for the plea pursuant to MCR 6.302(D)(1) or (D)(2)(b), the court must examine the psychiatric reports prepared and hold a hearing that establishes support for a finding that the defendant was mentally ill at the time of the offense to which the plea is entered." MCR 6.303.*

*As amended, effective January 1, 2006.

4.35 Withdrawal of a Guilty Plea

Effective January 1, 2006, MCR 6.311 was eliminated and its provisions were incorporated into MCR 6.310(C) and (D). On page 391, before subsection (A), delete the reference to MCR 6.311.

A. Withdrawal of Plea Before Sentencing

Replace all but the first paragraph on page 391 with the following:

A defendant has the right to withdraw a guilty plea before the court accepts the plea on the record. MCR 6.310(A).

MCR 6.310(B) sets forth the requirements for withdrawing a plea after the court accepts it but before the court imposes sentence.* MCR 6.310(B) states:

*As amended, effective January 1, 2006.

> "After acceptance but before sentence,

"(1) a plea may be withdrawn on the defendant's motion or with the defendant's consent only in the interest of justice, and may not be withdrawn if withdrawal of the plea would substantially prejudice the prosecutor because of reliance on the plea. If the defendant's motion is based on an error in the plea proceeding, the court must permit the defendant to withdraw the plea if it would be required by [MCR 6.310](C).

"(2) the defendant is entitled to withdraw the plea if

> "(a) the plea involves a prosecutorial sentence recommendation or agreement for a specific sentence, and the court states that it is unable to follow the agreement or recommendation; the trial court shall then state the sentence it intends to impose, and provide the defendant the opportunity to affirm or withdraw the plea; or
>
> "(b) the plea involves a statement by the court that it will sentence to a specified term or within a specified range, and the court states that it is unable to sentence as stated; the trial court shall provide the defendant the opportunity to affirm or withdraw the plea, but shall not state the sentence it intends to impose." MCR 6.310(B)(1)–(2), as amended.

CHAPTER 4
Criminal Proceedings

Part IV—Pleas (MCR Subchapter 6.300)

4.35 Withdrawal of a Guilty Plea

C. Withdrawal of Plea After Sentencing

Effective January 1, 2006, MCR 6.311 was deleted and its provisions were incorporated into MCR 6.310. On page 393, delete the asterisk and corresponding side note regarding these amendments and replace the first three paragraphs with the following text:

MCR 6.310(C) sets forth the requirements for withdrawing a plea after sentence is imposed:

> "The defendant may file a motion to withdraw the plea within 6 months after sentence. Thereafter, the defendant may seek relief only in accordance with the procedure set forth in subchapter 6.500. If the trial court determines that there was an error in the plea proceeding that would entitle the defendant to have the plea set aside, the court must give the advice or make the inquiries necessary to rectify the error and then give the defendant the opportunity to elect to allow the plea and sentence to stand or to withdraw the plea. If the defendant elects to allow the plea and sentence to stand, the additional advice given and inquiries made become part of the plea proceeding for the purposes of further proceedings, including appeals."

The issue preservation requirements formerly found in MCR 6.311(C) are now located in MCR 6.310(D). On page 393, in the introduction to the quoted text of subrule MCR 6.311(C), change the reference from MCR 6.311(C) to MCR 6.310(D).

CHAPTER 4

Criminal Proceedings

Part IV—Pleas (MCR Subchapter 6.300)

4.35 Withdrawal of a Guilty Plea

G. Appealing a Guilty Plea

Add the following text to the August 2005 update to pages 394–395:

Effective January 1, 2006, MCR 6.425(F)(2)(b) and (G)(1)(c) were further amended "to more accurately reflect the holding of the United States Supreme Court in *Halbert v Michigan*[.]"

CHAPTER 4
Criminal Proceedings

Part IV—Pleas (MCR Subchapter 6.300)

4.36 Sentence Bargaining

B. Violations of a Sentence Agreement or Recommendation

2. By Defendant

Effective January 1, 2006, MCR 6.310(C) was relettered (E) and amended. As amended, the subrule permits a prosecutor to move that a defendant's plea be vacated before *or after* sentence has been imposed if the defendant has failed to comply with the terms of a plea agreement.

Replace the first paragraph on page 397 with the following text:

MCR 6.310(E) states that "[o]n the prosecutor's motion, the court may vacate a plea if the defendant has failed to comply with the terms of a plea agreement."

CHAPTER 4

Criminal Proceedings

Part IV—Pleas (MCR Subchapter 6.300)

4.36 Sentence Bargaining

C. Enforcing a Sentence Agreement

Insert the following text after the first paragraph on page 399:

*As amended, effective January 1, 2006.

A defendant is entitled to withdraw his or her plea when the court is unable to comply with the prosecutor's sentence recommendation or agreement, or the court is unable to sentence a defendant in accord with the court's initial statement regarding the sentence it would impose. MCR 6.310(B)(2)(a)–(b).*

CHAPTER 4
Criminal Proceedings

Part IV—Pleas (MCR Subchapter 6.300)

4.37 Plea—Collateral Attack of Earlier Plea or Conviction

C. Uncontested Prior Convictions

Insert the following text after the first paragraph on page 401:

MCR 6.610(F)(2) incorporates the standard espoused by the *Garvie* and *Schneider* Courts in the above paragraph. MCR 6.610(F)(2) states:*

*Effective January 1, 2006.

> "Unless a defendant who is entitled to appointed counsel is represented by an attorney or has waived the right to any attorney, a subsequent charge or sentence may not be enhanced because of this [prior] conviction and the defendant may not be incarcerated for violating probation or any other condition imposed in connection with this [prior] conviction."

CHAPTER 4

Criminal Proceedings

Part V—Trials and Post-Trial Proceedings (MCR Subchapter 6.400)

4.38 Jury Trial

C. Voir Dire

On page 405, replace the second sentence of the second full paragraph with the following information:

MCR 2.511(G) states as follows regarding replacement of jurors removed during voir dire:

> "(G) Replacement of Challenged Jurors. After the jurors have been seated in the jurors' box and a challenge for cause is sustained or a peremptory challenge or challenges exercised, another juror or other jurors must be selected and examined. Such jurors are subject to challenge as are previously seated jurors."*

*Effective January 1, 2006.

MCR 2.511(F) prohibits discrimination in the jury selection process.* According to MCR 2.511(F):

*Effective January 1, 2006.

> "(1) No person shall be subjected to discrimination during voir dire on the basis of race, color, religion, national origin, or sex.
>
> "(2) Discrimination during voir dire on the basis of race, color, religion, national origin, or sex for the purpose of achieving what the court believes to be a balanced, proportionate, or representative jury in terms of these characteristics shall not constitute an excuse or justification for a violation of this subsection."

CHAPTER 4

Criminal Proceedings

Part V—Trials and Post-Trial Proceedings (MCR Subchapter 6.400)

4.38 Jury Trial

C. Voir Dire

1. Challenges for Cause

Effective January 1, 2006, MCR 2.511(D)(2) was deleted. Delete the reference to that rule in the second full paragraph on page 406.

CHAPTER 4

Criminal Proceedings

Part V—Trials and Post-Trial Proceedings (MCR Subchapter 6.400)

4.38 Jury Trial

H. View

Effective January 1, 2006, MCR 6.414 was amended and some of its provisions were reordered. On page 408, immediately following subsection (H), change the reference from MCR 6.414(D) to MCR 6.414(F). In the text following subsection (H), replace the second and third sentences at the bottom of page 408 and the first and second sentences at the top of page 409 with the following text:

MCR 6.414(F) sets forth the method by which the trial court may properly order a jury view:

> "(F) View. The court may order a jury view of property or of a place where a material event occurred. The parties are entitled to be present at the jury view. During the view, no persons other than, as permitted by the trial judge, the officer in charge of the jurors, or any person appointed by the court to direct the jurors' attention to a particular place or site, and the trial judge, may speak to the jury concerning a subject connected with the trial; any such communication must be recorded in some fashion."

4.39 Jury Waiver

A. Requirements

Effective January 1, 2006, MCR 6.402(A) was amended to conform with MCR 6.113(E), a new subrule that provides a process by which circuit courts may eliminate arraignments. Near the bottom of page 409, replace the second sentence with the following language:

Before accepting a defendant's waiver, the defendant must have been arraigned on the information (or have waived arraignment), properly advised of the right to a jury trial, and offered the opportunity to consult with an attorney. MCR 6.402(A). In a court where arraignments have been eliminated under MCR 6.113(E), the court may not accept a defendant's waiver of trial

by jury until the defendant has been provided with a copy of the information and offered an opportunity to consult with an attorney. MCR 6.402(A).

Note: Effective January 1, 2006, MCR 6.113(E) authorizes a circuit court to eliminate arraignments under specific circumstances. MCR 6.113(E) states: "A circuit court may submit to the State Court Administrator pursuant to MCR 8.112(B) a local administrative order that eliminates arraignment for a defendant represented by an attorney, provided other arrangements are made to give the defendant a copy of the information."

CHAPTER 4

Criminal Proceedings

Part V—Trials and Post-Trial Proceedings (MCR Subchapter 6.400)

4.41 Confrontation

A. Defendant's Right of Confrontation

4. Unavailable Witnesses

Insert the following text after the July 2005 update to page 415:

See also *People v Bauder*, ___ Mich App ___, ___ (2005) (where the Court of Appeals held that the victim's statements to friends, co-workers, and the defendant's relatives in the weeks before her death were not testimonial statements and their admission did not violate the defendant's right of confrontation).

CHAPTER 4

Criminal Proceedings

Part V—Trials and Post-Trial Proceedings (MCR Subchapter 6.400)

4.41 Confrontation

B. Special Arrangements to Accommodate Compelling Interests

Effective January 1, 2006, the Michigan Supreme Court adopted a new court rule, MCR 6.006, that addresses the use of video and audio technology in specific court proceedings. Replace the first full paragraph near the top of page 416 with the following text:

MCR 6.006 governs the use of video and audio technology in the conduct of specific court proceedings. In its entirety, MCR 6.006 states:

> "(A) Defendant in the Courtroom or at a Separate Location. District and circuit courts may use two-way interactive video technology to conduct the following proceedings between a courtroom and a prison, jail, or other location: initial arraignments on the warrant or complaint, arraignments on the information, pretrial conferences, pleas, sentencings for misdemeanor offenses, show cause hearings, waivers and adjournments of extradition, referrals for forensic determination of competency, and waivers and adjournments of preliminary examinations.
>
> "(B) Defendant in the Courtroom—Preliminary Examinations. As long as the defendant is either present in the courtroom or has waived the right to be present, on motion of either party, district courts may use telephonic, voice, or video conferencing, including two-way interactive video technology, to take testimony from an expert witness or, upon a showing of good cause, any person at another location in a preliminary examination.
>
> "(C) Defendant in the Courtroom—Other Proceedings. As long as the defendant is either present in the courtroom or has waived the right to be present, upon a showing of good cause, district and circuit courts may use two-way interactive video technology to take testimony from a person at another location in the following proceedings:
>
> > "(1) evidentiary hearings, competency hearings, sentencings, probation revocation proceedings, and

proceedings to revoke a sentence that does not entail an adjudication of guilt, such as youthful trainee status;

"(2) with the consent of the parties, trials. A party who does not consent to the use of two-way interactive video technology to take testimony from a person at trial shall not be required to articulate any reason for not consenting.

"(D) Mechanics of Use. The use of telephonic, voice, video conferencing, or two-way interactive video technology, must be in accordance with any requirements and guidelines established by the State Court Administrative Office, and all proceedings at which such technology is used must be recorded verbatim by the court."

CHAPTER 4

Criminal Proceedings

Part V—Trials and Post-Trial Proceedings (MCR Subchapter 6.400)

4.45 Stipulations, Statements, and Arguments

B. Opening Statement

Effective January 1, 2006, MCR 6.414 was amended and some of its provisions were relettered. At the very bottom of page 421, change the court rule cited from MCR 6.414(B) to MCR 6.414(C). At the top of page 422, replace the quoted text with the following text:

> "(C) Opening Statements. Unless the parties and the court agree otherwise, the prosecutor, before presenting evidence, must make a full and fair statement of the prosecutor's case and the facts the prosecutor intends to prove. Immediately thereafter, or immediately before presenting evidence, the defendant may make a like statement. The court may impose reasonable time limits on the opening statements." MCR 6.414(C).

C. Closing Argument

At the top of page 423, replace the text appearing before sub-subsection (1) with the following text:

MCR 6.414(G) provides:*

> "(G) Closing Arguments. After the close of all the evidence, the parties may make closing arguments. The prosecutor is entitled to make the first closing argument. If the defendant makes an argument, the prosecutor may offer a rebuttal limited to the issues raised in the defendant's argument. The court may impose reasonable time limits on the closing arguments."

*As amended, effective January 1, 2006.

CHAPTER 4

Criminal Proceedings

Part V—Trials and Post-Trial Proceedings (MCR Subchapter 6.400)

4.47 Directed Verdict

C. Motion for Involuntary Dismissal in Bench Trial

Effective January 1, 2006, MCR 6.419 was amended and a provision addressing bench trials was adopted. Delete the last two lines at the bottom of page 430, and at the top of page 431, replace the quoted text with the following language:

> "(C) Bench Trial. In an action tried without a jury, after the prosecutor has rested the prosecution's case-in-chief, the defendant, without waiving the right to offer evidence if the motion is not granted, may move for acquittal on the ground that a reasonable doubt exists. The court may then determine the facts and render a verdict of acquittal, or may decline to render judgment until the close of all the evidence. If the court renders a verdict of acquittal, the court shall make findings of fact." MCR 6.419(C).

4.48 Jury Instructions

A. Generally

Effective January 1, 2006, MCR 6.414 was amended to include a provision that requires a trial court, before beginning a trial, to deliver to the jury appropriate pretrial instructions. Before the first paragraph near the bottom of page 431, insert the following text:

MCR 6.414(A) requires a trial court to deliver pretrial instructions to the jury. Specifically, the rule states: "Before trial begins, the court should give the jury appropriate pretrial instructions."

CHAPTER 4

Criminal Proceedings

Part V—Trials and Post-Trial Proceedings (MCR Subchapter 6.400)

4.48 Jury Instructions

B. Content of Instructions

On page 432, change all references in the first paragraph from MCR 6.414(F) to MCR 6.414(H) and replace the last sentence in the first paragraph with the following text:

The court must instruct the jury after the parties have completed (or waived) closing arguments. MCR 6.414(H). "[A]t the discretion of the court, and on notice to the parties, the court may instruct the jury before the parties make closing arguments, and give any appropriate further instructions after argument." MCR 6.414(H).*

*As amended, effective January 1, 2006.

CHAPTER 4

Criminal Proceedings

Part V—Trials and Post-Trial Proceedings (MCR Subchapter 6.400)

4.49 Jury Deliberation

A. Materials in Jury Room

Insert the following text after the paragraph on page 435:

*As amended, effective January 1, 2006.

The court has discretion in determining whether to permit jurors to take with them into the jury room any notes taken during trial. MCR 6.414(D) provides in part:*

> "The court may, but need not, allow jurors to take their notes into deliberations. If the court decides not to permit the jurors to take their notes into deliberations, the court must so inform the jurors at the same time it permits the note taking. The court shall ensure that all juror notes are collected and destroyed when the trial is concluded."

CHAPTER 4

Criminal Proceedings

Part V—Trials and Post-Trial Proceedings (MCR Subchapter 6.400)

4.49 Jury Deliberation

C. Hung Jury

Insert the following after the bulleted list on page 436:

Effective January 1, 2006, MCR 6.420(C) authorizes the court to accept a unanimous jury verdict on any of the counts charged against a defendant, even though the jury cannot reach a unanimous verdict on all counts. Specifically, MCR 6.420(C) states:

> "(C) Several Counts. If a defendant is charged with two or more counts, and the court determines that the jury is deadlocked so that a mistrial must be declared, the court may inquire of the jury whether it has reached a unanimous verdict on any of the counts charged, and, if so, may accept the jury's verdict on that count or counts."

CHAPTER 4

Criminal Proceedings

Part V—Trials and Post-Trial Proceedings (MCR Subchapter 6.400)

4.50 Jury Questions

B. Questions During Trial

Effective January 1, 2006, MCR 6.414 was amended and a subrule addressing juror questions was added. Insert the following text after the paragraph on page 438:

MCR 6.414(E) formalizes the result reached by the Court in *People v Heard*, discussed above:

> "(E) Juror Questions. The court may, in its discretion, permit the jurors to ask questions of witnesses. If the court permits jurors to ask questions, it must employ a procedure that ensures that inappropriate questions are not asked, and that the parties have the opportunity to object to the questions."

CHAPTER 4

Criminal Proceedings

Part V—Trials and Post-Trial Proceedings (MCR Subchapter 6.400)

4.51 Verdict

F. Multiple Charges—Verdict on One or More Counts But Not All

Effective January 1, 2006, MCR 6.420(C) authorizes the court to accept a unanimous jury verdict on any of the counts charged against a defendant, even though the jury cannot reach a unanimous verdict on all counts. On page 441, before Section 4.52, insert the new subsection (F) as indicated above and add the following text:

Where a defendant is charged with multiple counts and the jury reaches a unanimous verdict on any of the counts, the court may accept the jury's verdict with regard to that count or those counts, even if the jury is unable to reach a unanimous verdict on all counts charged against the defendant. Specifically, MCR 6.420(C) states:

> "(C) Several Counts. If a defendant is charged with two or more counts, and the court determines that the jury is deadlocked so that a mistrial must be declared, the court may inquire of the jury whether it has reached a unanimous verdict on any of the counts charged, and, if so, may accept the jury's verdict on that count or counts."

CHAPTER 4

Criminal Proceedings

Part V—Trials and Post-Trial Proceedings (MCR Subchapter 6.400)

4.53 New Trial

A. Generally

Replace the first sentence in the paragraph on page 444 with the following:

"A motion for a new trial may be filed before the filing of a timely claim of appeal." MCR 6.431(A)(1).* "If the defendant may only appeal by leave or fails to file a timely claim of appeal, a motion for a new trial may be filed within 6 months of entry of the judgment of conviction and sentence." MCR 6.431(A)(3), as amended.

*As amended, effective January 1, 2006.

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.54 Sentencing—Felony

E. Resentencing

Insert the following language after the paragraph on page 454:

Either party may file a motion to correct an invalid sentence. MCR 6.429(A).* See MCR 6.429(B)(1)–(4), as amended, for the time requirement for filing such a motion.

*As amended, effective January 1, 2006.

F. Appeal Rights

Effective January 1, 2006, MCR 6.425(F)(2)(b) and (G)(1)(c) were further amended "to more accurately reflect the holding of the United States Supreme Court in *Halbert v Michigan*[.]" Replace the content of the August 2005 update to page 455 with the following text:

Immediately after imposing sentence on a defendant convicted by plea, the court must advise the defendant that if he or she is financially unable to retain an attorney, the court will appoint an attorney to represent the defendant on appeal. MCR 6.425(F)(2)(b).

When an indigent defendant requests an attorney within 42 days after he or she was sentenced on a conviction by plea, the court must enter an order appointing an attorney. MCR 6.425(G)(1)(c).

Insert the following text before subsection (G) on page 455:

When the performance of a defendant's appointed or retained counsel prevents the defendant from timely appealing a judgment, MCR 6.428, a new court rule effective January 1, 2006, provides a defendant with an opportunity to remedy the initial untimely appeal. MCR 6.428 states:

> "If the defendant did not appeal within the time allowed by MCR 7.204(A)(2) and demonstrates that the attorney or attorneys

retained or appointed to represent the defendant on direct appeal from the judgment either disregarded the defendant's instruction to perfect a timely appeal of right, or otherwise failed to provide effective assistance, and, but for counsel's deficient performance, the defendant would have perfected a timely appeal of right, the trial court shall issue an order restarting the time in which to file an appeal of right."

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.55 Sentencing—Habitual Offender

A. Notice Required

Insert the following text after the paragraph at the top of page 457:

The notice of intent to seek enhancement under MCR 6.112(F) must be filed within 21 days after the defendant's arraignment on the information, or if the defendant waives arraignment, within 21 days after the information is filed. MCR 6.112(F).*

*As amended, effective January 1, 2006.

APPENDIX

Checklists, Scripts, Forms

- FELONY PLEA, Script/Checklist

The amendment to MCR 6.302(B), effective January 1, 2006, affects the content of any writing used to advise a defendant of his or her guilty plea rights. Therefore, on the second page of the felony plea checklist in the appendix, move the following paragraph so that it appears immediately before the information in brackets—[Option to above: If the court is using a written waiver form]:

> If I accept your plea, any appeal will be by leave of the Court of Appeals. That means there is no automatic right to appeal. Instead, you would have to ask the Court of Appeals to hear your case and it would be up to them whether they would. Do you understand that?